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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1487

HARTZELL PROPELLER FAN COMPANY,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

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Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United Stats

The Petitioner, Hartzell Propeller Fan Company, prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Sixth Circuit, granting enforcement of an order of the National Labor Relations Board (hereafter called the "Board") by an order.

OPINIONS BELOW

The Court of Appeals for the Sixth Circuit rendered an opinion in the form of an order on January 8, 1971, which in relevant part states:

> "This case is before the Court on the application of the National Labor Relations Board to enforce an order against respondent. The decision and order of the Board are reported in 172 N.L.R.B. No. 163.
>
> "The Union won a Board-supervised election by a vote of 71 to 54 and was certified as bargaining represenative. The case involved a review of both a representation proceeding and the unfair labor practice proceeding, including the order requiring respondent to bargain with the Union. Reference is made to the decision of the Board for a complete recitation of the facts.
>
> "We find that the decision of the Board is supported by substantial evidence on the record considered as a whole, *N.L.R.B. v. Gaffner Automotive & Machine Co., Inc.*, 400 F. 2d 10 (6th Cir.)
>
> "It is ORDERED that the order of the Board be and it is hereby enforced.
>
> "Judge O'Sullivan dissents. He would deny enforcement on the ground that the Union was guilty of coercion, threats and intimidation and that the decision of the Board is not supported by substantial evidence on the record considered as a whole.
>
> "Entered by order of the Court."

The above was issued and subsequent to that date a petition to stay the mandate was timely filed and granted. This petition is filed pursuant thereto. The above "order" is the decision of the Court below in this case. Citations to the record are to the Appendix filed in the Court below, copies of which were filed with the

record as certified by the Clerk of the Court below and required by Federal Rules of Appellate Procedure, Rule 30. The Appendix filed with the Court below and with this Court will be cited as "Appendix," "A.," and page number, "p."

QUESTIONS PRESENTED

1. There is a conflict within and between and among the circuits and between the Board and one Circuit as to the legal effect of a unions waiver of fees and dues prior to an election held by the Board pursuant to Sections 7 and 9 of the Act.

2. All waivers of fees and dues by unions prior to an election held by the Board must be declared unlawful under Sections 7 and 9 of the Act, since to do otherwise would frustrate the policy behind these sections of the Act, which raises a substantial question of federal law which had not been, but should be settled by this Court.

3. In this case the Board and the Court below have adopted an erroneous construction of the concept of agency under Section 2(13) of the Act, which raises a substantial question of federal law which has not been, but should be settled by this Court.

4. The Board and the Court below have adopted an erroneous standard as to the effect of unlawful conduct upon the employees covered by the Act contrary to the requirements of the Act and in a way in conflict with the applicable decisions of this Court.

STATUTE INVOLVED

The statute involved is the National Labor Relations Act, as amended, and more specifically, Sections 2, 7,

8 and 9 of this Act, 29 U.S.C.A. 152, 157, 158, 159, the applicable parts of which are as follows:

"Text of Labor Management Relations Act, 1947
as Amended by Public Law 86-257, 1959*
(Public Law 101-80th Congress)

AN ACT

* * * * *

DEFINITIONS

SEC. 2. When used in this Act—* * * * *
(13) In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9 * * * * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to sub-section (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be

made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

STATEMENT

Petitioner operates a plant in Piqua, Ohio where it is engaged in the production of fans and similar items. On November 30, 1967, under the direction and supervision of the Board, a secret ballot election was conducted among its employees. The results of the election were 71 for the union and 54 for the company with two ballots challenged. On December 7, 1967 Petitioner filed objections to the conduct of the election and thereafter a hearing was held on these objections on February 28, 1968. In a report issued after the hearing the agent of the N.L.R.B. presiding at the hearing overruled Petitioner's objections and this ruling was affirmed by the Board both in the representation proceeding and in a subsequent unfair labor practice case upon a motion for summary judgment. The unfair labor practice case arose because of Petitioner's refusal to bargain with the union involved in the representation case as a means of testing the validity of the Board's rulings in the courts. It is Petitioner's contention that certain events took place prior to the election of November 30, 1967, which are best described in the following.

All of the witnesses called at the hearing by Petitioner were rank-and-file employees and all testified as to what had happened to them or their fellow employees either on Petitioner's plant premises or at union meetings. These employees were not highly paid; for example, one received take-home pay in the amount of $81.25 per week. (A. 94; also see A. 120; A. 140; A. 168; A. 214; A. 224; A. 243) During the union cam-

paign there was much discussion about union initiation fees and dues as these items related to the employee's obligation to pay and the time such payments were due. Even those actively involved on behalf of the union had an incomplete understanding of the obligations due the union. (A. 235) Numerous employees indicated it was their understanding that any employee who had not paid a $10 initiation fee prior to the election would be required to pay a $50 or $100 fee after the election, were the union to win and according to the hourly rate of pay. (A. 78; A. 84; A. 105-07; A. 111-13; A. 122; A. 131-32; A. 144-48; A. 157; A. 172; A. 240; A. 249; A. 253; A. 254-58; A. 280; A. 290; A. 338) A union official testified there was a thirty day grace period after the execution of a union contract during which the employees could join the union at the reduced fee schedule, yet an employee of Petitioner testified nothing was known about this until a week or so before the hearing. (A. 132-33; A. 144; A. 146; also see A. 249) The union never communicated to the employees of Petitioner in writing its official position as to union fees and dues, while Petitioner prior to the election informed its employees of what it understood was the union's position on these matters. (A. 348)

Also during the pre-election period employees of Petitioner were threatened by fellow employees who were active on behalf of the union. These threats occurred on Petitioner's premises and, apparently, during working hours if not on actual work time. One threat, however, was made at a union meeting by a union official, which was in addition to the statements set out above concerning fee waivers. One employee testified she was told that if she did not pay her money and the union won the election it could take her to court and she could lose her job. (A. 40-41) During a conversa-

tion about union fees, this same employee was told by an active union adherent that he understood she had two children. This was after she had refused to pay her money. (A. 42) Another employee testified he overheard two active union adherents indicate an employee opposed to the union would "feel funny" if he left work and found his car burned. (A. 173) The same anti-union employee was told by an active union adherent that if he did not pay his money and sign up for the union he would have his head bashed in, or possibly, if this could not be done by a pro-union employee alone, he would get help. (A. 203) Another employee was told by a pro-union employee, she might feel funny if there was some dynamite placed in her car. (A. 216) At a union meeting, an admitted union agent told a group of Petitioner's employees that in the event of a strike at the plant in question, the other plants of Petitioner would not receive deliveries. (A. 198)

In the proceedings below not all of the above evidence was credited, but in its brief before the Court below the Board accepted as proven three instances of coercion. (Board's Brief, 12-13, fn. 14) The record shows the union adherents involved in admitted acts of coercion were known to the employees of Petitioner as those for the union, had hired halls for union meetings, accepted receipts for fee payments, and one of them sat at the front of a meeting with admitted union representatives. These men also served as contacts for recognized union representatives with reference to Petitioner's employees. (A. 65; A. 205; A. 285; A. 283-84; A. 293; A. 310-11; A. 279-80; A. 177; A. 225; A. 234) Petitioner would admit to this Court that there is a dispute as to the facts and what they imply.

REASONS FOR GRANTING THE WRIT

There is a Conflict Within and Between the Circuits and Between the Board and one Circuit as to the Legal Effect of a Union's *W*aiver of Fees and Dues Prior to an Election Held by the Board Pursuant to Sections 7 and 9 of the Act.

Due to the fact the "order" of the Court below gives virtually no explication of the reasoning behind its granting enforcement of the Board's Decision and Order, the status of the rule on union fee and dues waivers prior to a Board conducted election in the courts is not certain. This failure to explicate by the Court below leaves Petitioner with no alternative but to take the position that there is a conflict within the decisions of the Court below unless the instant case amounts to a *sub silentio* overruling of one of its prior decisions. Thus, in *N.L.R.B. v. Gilmore Industries*, 341 F. 2d 240 (CA-6 1965) the Court below refused enforcement of a Board order on the ground that a fee waiver conditioned on an election victory in the sense that those who did not pay the small fee before the election would have to pay a much higher fee after the election, was unlawful, particularly because the difference in the size of the fee involved is substantial, and the true size of the fee was not disclosed. It is Petitioner's position that these facts exist in the record in this case.

The Court below, however, in *N.L.R.B. v. Gafner Automotive & Machine, Inc.*, 400 F. 2d 10 (CA-6 1968) indicated fee waivers were valid if not conditioned on the outcome of an election, ignoring the size of the fee involved as a factor, and without explication chose to follow *Gafner* in the instant case. As pointed out in its brief to the Court below the Board interprets the Court below as being opposed to its rule in cases of

this type which is stated as "waivers, or provisional waivers, of union initiation fees, whether contingent upon the results of an election or not, have no improper effect on the freedom of choice of the electorate, and do not constitute a basis for setting aside an election." *Dit-Mco Incorporated*, 163, NLRB 1019, 1022 (1967) affirmed by accepting the preceding as valid and controlling, 428 F. 2d 774 (CA-8 1970). In sum, if these decisions be read for what they say there are conflicts in the decisional law in the area of union fee waivers, requiring clarificaton by ths Court. Similarly, the First Circuit follows the *Gilmore* reasoning, while the Second Circuit follows the *Dit-Mco* reasoning. *N.L.R.B. v. Gorbea, Perez & Morell*, 328 F. 2d 679 (CA-1 1964) should be compared with *Amalgamated Clothing Workers of America, AFL-CIO v. N.L.R.B.*, 345 F. 2d 268 (CA-2 1965)

All Waivers of Fees and Dues by Unions Prior to an Election Held by the Board Must be Declared Unlawful Under Sections 7 and 9 of the Act, Since to do Otherwise Would Frustrate the Policy Behind These Sections of the Act, Which Raises a Substantial Question of Federal Law Which had not Been, but Should be Settled by this Court.

Section 7 of the National Labor Relations Act, as amended, 29 U.S.C.A. 157 provides, in relevant part, that "employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all of such activities." In protecting these rights, given parity under the Act, Section 8(a)(1) of the Act, as amended, 29 U.S.C.A. 158(a)(1), provides in relevant part, that "it shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce

employees in the exercise of the rights guarantee in Section 7 of the Act, while Section 8(b)(1)(A) of the Act as amended, 2 9U.S.C.A. 158(b)(1)(A) in relevant part provides that "it shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7." It has been clear for a number of years that employers coerce and restrain their employees when they condition in any way the receipt of benefits on the outcime of an election. In fact, even where benefits are placed into effect during an election period on an unconditional basis they amount to unlawful interference, where an anti-union purpose is shown. This is especially so when the so-called waiver, be it conditional or unconditional, in the instant case, was coupled with a direct threat of loss of employment, physical threats made to employees and a threat of a secondary boycott at Petitioner's other locations. *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409, 84 S. Ct. 457, 11 L. Ed. 2d 435 (1964).

Of course, unions must live during an organizational compaign by their promises of improvements and this is apparently the basis for the distinction between "interference with, restrain or coerce" as to unions under the Act. However, where fee waivers of any kind are coupled with threats it would seem clear employees are subjected to exactly the kind of conduct Section 8(b)(A) of the Act was passed to prohibit. Prior to *Dit-Mco Incorporated*, 163 NLRB 1019 (1967) it had been the Board's position that fee waivers "contingent on how the employees voted in the election or on the results of the election" were unlawful. *Gruen Watch Co.*, 108 NLRB 610, 613 (1954); *Lobue Bros.*, 109 NLRB 1181 (1954). Similarly, where as here, the waiver involves a considerable amount of money — $50 or

$100 as opposed to $10 for employees taking home about $90 a week — it would seem the waiver itself is inherently coercive. It has long been held that certain conduct on the part of an employer is inherently coercive, *N.L.R.B. v. Burnup and Sims, Inc.*, 379 U.S. 21, 23, 85 S. Ct. 171, 13 L. Ed. 2d (1967); *N.L.R.B. v. Erie Resister Corp.*, 373 U.S. 221, 83 S. Ct. 1139, 94 ALR2d 1147, 10 L. Ed. 2d 308 (1963).

It would seem less than candid for the Board to state, as it does in the instant case, and in *Dit-Mco* that all employees need to do is vote against the union and the fee waiver problem is solved. Unions in fact win more than fifty percent of the elections conducted by the Board and the simple act of voting against the union just does not solve the problem. 1969 LABOR RELATIONS YEARBOOK 516-20 (1970). Similarly, employers are now required by law to supply unions with the names and addresses of all eligible voters; and therefore, regardless of what an individual employee's attitude toward unionization is, the union can reach him literally where he lives. *N.L.R.B. v. Wyman-Gordon Company*, 89 S. Ct. 1426, 394 U.S. 759 (1969). When this is coupled with the fact that unions can, where circumstances permit, rely on union cards as a substitute for an election, it would seem to be clear that fee waivers, if valid, would establish in the context of this and all similar cases a set of facts so favorable to unionization as to destroy the concept of "the right to refrain" in Section 7 of the Act. *N.L.R.B. v. Gissel Packing Co.*, 89 S. Ct. 1918, 395 U.S. 575, 23 L. Ed. 2d 547 (1969).

As a matter of policy it is becoming increasingly apparent that unions are no longer so weak and ineffectual as to require governmental protection. Congress recognized this when it amended the Act in 1947

by adding the right to refrain language to Section 7, as well as the unfair labor practice language in Section 8. It would seem to be time to recognize the implications of these amendments and their attempt to establish parity of rights under the Act as to joining or refraining from joining a union. Certainly it does not require anything more than a working knowledge of what appears in the newspapers, much less expertise, to know unions in fact now have the power to make their promises or threats, as the case may be, come true. One member of the Board itself has come to this conclusion. *Lach-Simpkins Dental Labs*, 75 LRRM 1385, 1386, 186 NLRB No. 116 (1970); *Janler Plastic Mold Corp.*, 75 LRRM 1366, fn. 3, 186 NLRB No. 80 (1970).

In this Case the Board and the Court Below Have Adopted an Erroneous Construction of the Concept of Agency Under Section 2(13) of the Act, Which Raises a Substantial Question of Federal Law Which Has Not Been, But Should be Settled by This Court.

As pointed out in the statement, the employees of Petitioner who played leading parts in the fee waiver and threat campaign at the plant gave every indication of being agents on behalf of the union. Certainly when one holds himself out by insisting fellow employees sign cards, gives receipts for dues, sits at the front table of a meeting chaired by admitted union officials, and hires halls for union meetings, he would seem to be an agent. This is particularly true when Section 2(13) of the Act, 29 U.S.C.A. 152(13), provides:

"In determining whether any person is acting as an 'agent' so as to make such other person responsible for his acts, the question of whether the specific

> acts performed were actually authorized or subsequently ratified shall not be controlling."

As this Court has recognized, the above was passed in recognition of the modern and broader concepts of agency and as a means of bringing the Act into alignment with these concepts. *United Mine Workers of America v. Gibbs*, 383 U.S. 714, 736, 86 S. Ct. 1130, 16 L. Ed. 2d 234 (1966).

Although the Court failed to discuss the issue of agency under the Act, more significant is the fact the only reference to the issue was at the hearing level wherein the evidence set out in Petitioner's statement was not really discredited or discussed, but rather, it was ignored. (A. 12-14) Most significant, however, is the finding that:

> "(t)the record clearly indicates that Petitioner (the union) did not authorize or ratify the conduct of which the Employer (Petitioner) here complains and in fact was not aware of its alleged occurrence until after the election." (A 13)

It is obvious this finding is contrary to the statutory requirements set out above, yet neither the Board nor the Court below chose to comment on this matter. This is strange, indeed, in light of the Court below's position that Section 2(13) of the Act is to be given "a liberal construction." *N.L.R.B. v. General Metal Products Company*, 410 F. 2d 473, 476 (CA-6 1969) citing with approval *International Association of Machinists v. N.L.R.B.*, 311 U.S. 72, 80, 61 S .Ct. 83, 85 L. Ed. 50 (1940); *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485, 67 S. Ct. 789, 91 L. Ed. 1040 (1947). In light of the preceding it would seem clear that unless a restrictive and highly technical treatment be given the concept of agency, this case must be either remanded

or reversed, or as stated by this Court:

> "We are dealing here with private rights . . . not with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of employer's domination or influence. The existence of that interference must be determined by careful scrutiny of all the factors, often subtle, which restrain the employees' choice for which the employer may fairly said to be responsible. Thus where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates." *International Association of Machinists, etc. v. N.L.R.B.*, 61 S. Ct. 83, 88, 311 U.S. 72, 80, 85 L. Ed. 50 (1940)

Unless the Board adopts a stance amounting to a violation of due process and equal protection of the law under the Fifth Amendment, if the test announced by this court is to have equal application to those within the ambit of the Act's regulation, then there can be no doubt the underpinning for the Board's determination on the agency issues in this case is invalid and so is the tacit acceptance of this determination by the Court below, albeit this might require remand of this case. The reason this is so is that if the test is "just cause to believe," it is uncontroverted in the record that those involved in the admitted coercion were also those known to the employees to be acting on behalf of the union. (A. 40-44; A. 65; A. 173; A. 205; A. 283-85; A. 279-80; A. 177; A. 225; A. 234; A. 203; A. 216)

The Board and the Court Below Have Adopted an Erroneous Standard as to the Effect of Unlawful Conduct Upon Employees Covered by the Act Contrary to the Requirements of the Act and in a Way in Conflict With the Applicable Decisions of This Court.

In granting enforcement of the Board's order and decision the Court below affirmed the portions of the Hearing Officer's opinion as to the finding that although Petitioner's employees had been threatened and intimidated the conduct was isolated and by use of a subjective standard did not permeate the campaign. (R.A. 13-17) The conduct involved — threats of violence and bodily injury ,as well as possible loss of employment — has been found by this Court to be violative of Section 8(b)(1)(A) of the Act. *U.A.W. v. Wisconsin Emp. Sec. Bd.*, 351 U.S. 266, 76 S. Ct. 794, 100 L. Ed. 1162 (1956; Anno., "Construction of S. 8(b)(1)(A) of the Taft-Hartley Acts Making it an Unfair Labor Practice for Unions to Coerce Employees in Exercising their Rights to Join in or Refrain from Union Activities," 18 L. Ed. 2d 1651, 1658-60; 98 L. Ed. 496; 4 L. Ed. 2d 2026. Similarly, the subjective standard referred to above has been specifically rejected by the Board on the basis of its reading of this Court's position, thus:

> "The Hearing Officer observed that there were two supervisors who made statements which could have had a restraining or coercive effect on six employees out of a total employee compliment of approximately 730 eligible voters, and I feel this point to be most relevant, particularly in view of the existence of certain friendly relationships. However, the restraining effect of coercive conduct is not limited to the employees directly involved. Rather,

the Board and the courts have long recognized that employer interrogation and threats concerning union activity, particularly in an industral plant and during a pre-election campaign are likely to receive prompt and wide circulation. Thus, to evaluate properly the probable effect of conduct which is coercive in nature, the number of instances of interference, or the number of employees directly involved cannot serve as determinating factors."

* * * * *

"3." See *N.L.R.B. v. Donnelly Garment Co.*, 330 U.S. 219, 231, 19 LRRM 2317, where the Supreme Court observed that 'a feeling by employees that they were under no sense of constraint . . . is a subtle thing, and the recognition of constraint may call for a high degree of introspective perception' . . . Since the impact of the specific conduct upon the employees directly involved is so inexactly ascertainable, the possibility of measuring the precise impact upon others not identified would appear futile. However, as the Supreme Court further observed in that case, 'Out of repeated instances of hearing the same thing, a generalization as to its worth will almost inevitable emerge in the thoughts of the tribunal." *Intercontinental Mfg. Co., Inc.*, 66 LRRM 1156, fn. 3, 167 NLRB 769, 770, fn. 3 (1967)

Why neither the Court below, nor the Board, came to grips with these problems, in Petitioner's view does amount to a violation of equal protection and due process within the meaning of the Fifth and Fourteenth Amendments. This Court has long taken the position that the standards applicable under 8(b) are the same as those under 8(a) of the Act. *Marine Engineers Beneficial Asso. v. Interlake S.S. Co.*, 370 U.S.

173, 82 S. Ct. 1237, 8 L. Ed. 2d 418 (1962); *I.L.G.W.U. v. N.L.R.B.*, 366 U.S. 731, 81 S. Ct. 1603, 6 L. Ed 2d 762 (1961); and rather recently this Court has admonished the Courts below with:

> "Reviewing courts are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *N.L.R.B. v. Brown*, 380 U.S. 278, 291, 85 S. Ct. 980, 13 L. Ed. 2d 839 (1965)

In addition, for some time now the Board has applied a lesser standard to election objections than it has to unfair labor practice matters. In sum, without the unfair labor practices shown in Petitioner's statement, the Board under its own standards would have set the election aside in the instant case. *General Shoe Corporation*, 77 NLRB 127 (1948). Similarly, the test applied has been objective in the sense that where threats are shown there is no need to show impact of such conduct on the voters, nor is it necessary to show anything more than whether the conduct charged was reasonably calculated to interfere with the employees' free choice. *N.L.R.B. v. Trancoa Chemical Corporation*, 303 F. 2nd 456 (CA-1 1962); *Celanese Corp. of America v. N.L.R.B.*, 291 F. 2d 225 (CA-7 1961); *Lee Cylinder Division of Bolay & Co., Inc.*, 156 NLRB 1252 (1966). The basis for this approach is statutory, since were litigants required to show the subjective effect of improper conduct arising under the Act, employees would be left without the Section 7 rights Congress has found to need protection. *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969).

CONCLUSION

For the reasons stated above, Petitioner asks that its petition be granted or the cause be remanded, and for all further and proper relief in the premises.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1487

HARTZELL PROPELLER FAN COMPANY,

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITIONER'S APPENDIX

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No. 20,361

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT COURT

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,	)	
v.	)	ORDER
HARTZELL PROPELLER FAN COMPANY, *Respondent.*	)	

Before PHILLIPS, Chief Judge, MILLER, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

This case is before the Court on the application of the National Labor Relations Board to enforce its order against respondent. The decision and order of the Board are reported at 173 N.L.R.B. No. 163.

The Union won a Board-supervised election by a vote of 71 to 54 and was certified as bargaining representative. The case involves a review of both the representation proceeding and the unfair labor practice proceeding, including the order requiring respondent to bargain with the Union. Reference is made to the decision of the Board for a complete recitation of the facts.

We find that the decision of the Board is supported by substantial evidence on the record considered as a whole. *N.L.R.B. v. Gafner Automotive & Machine, Inc.*, 400 F.2d 10 (6th Cir.)

It is ORDERED that the order of the Board be and hereby is enforced.

Judge O'Sullivan dissents. He would deny enforce-

ment on the ground that the Union was guilty of acts of coercion, threats and intimidation and that the decision of the Board is not supported by substantial evidence on the record considered as a whole.

Entered by order of the Court.

CARL W. REUSS
Clerk

(Caption Omitted in Printing)
(Case No. 8-RC-6914)

HEARING OFFICER'S REPORT ON OBJECTIONS TO ELECTION

Pursuant to a Stipulation for Certification upon Consent Election approved by the Regional Director for Region 8 on October 26, 1967,[1] an election by secret ballot was conducted on November 30, 1967 under the direction and supervision of said Regional Director in the following described unit:

> All production and maintenance employees including foundry employees and trainees in the Employer's plant at 910 South Downing Street, Piqua, Ohio, but excluding all office clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act.

Upon the conclusion of the balloting, the parties were furnished with a Tally of Ballots, showing that of approximately 152 eligible voters, 127 cast ballots of which 71 were for, and 54 against, the Petitioner.

---

[1]The petition in this matter was filed on September 29, 1967.

There were two challenged ballots, a number insufficient to affect the results of the election. On December 7, 1967 the Employer filed timely objections to conduct affecting the results of the election, a copy of which was duly served upon the Petitioner. The Regional Director caused an investigation of the objections to be made, and thereafter on January 3, 1968, the Acting Regional Director for Region 8 issued and served upon the parties his Report on Objections and Order Directing Hearing on Objections. In his report, the Acting Regional Director concluded that the issues raised by Employer's Objections 1(A) and 1(D) should be resolved at a hearing and that since no evidence was presented or disclosed during the investigation as to Objections 1(B) and 1(C) said objections be overruled. The Acting Regional Director further directed that the Hearing Officer designated for the purpose of conducting the hearing prepare and cause to be served upon the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the objections.

On January 10, 1968, the Employer filed timely exceptions to the Acting Regional Director's report and on January 31, 1968 the Board issued its Order adopting the findings and recommendations of the Acting Regional Director and directed a hearing to resolve the issues raised in (2) accordance with the Acting Regional Director's Order. Pursuant to the Board's Order, a hearing before the undersigned was held in Piqua, Ohio, on February 28 and 29, 1968. All parties to this proceeding were present at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence

bearing on the issues. The Employer submitted a brief which has been duly considered by the undersigned.

Upon the entire record of the case and from my observation of the witnesses, the undersigned makes the following findings, conclusions and recommendations with respect to the issues presented in this proceding.

THE OBJECTIONS

The Employer filed four objections of which only Objections 1(A) and 1(D) are at issue in this matter. Said objections read as follows:

1. Petitioner engaged in a course of unlawful conduct requiring election be set aside which includes among other things, the following:

(A) Petitioner told employees if they failed to join and/or vote for Petitioner, they would have to pay high initiation fees and be compelled to join Petitioner.

(D) The contest (sic) of Petitioner's campaign shows intimidation, coercion, threats and misrepresentation.

Wherefore, because of this conduct, the election must be set aside.

The Employer's objections which are the subject of this proceeding raise the following issues and the evidence adduced at the hearing will be considered under said issues:

(1) Whether representatives of Petitioner informed employees that if they did not pay a $10 initiation fee prior to the election, they would be required to pay a $50 or $100 fee.

(2) Whether employees who were active on behalf of Petitioner made threats and misrepresentations to employees.

(3) Whether representatives of Petitioner threatened employees with an illegal secondary boycott.

Issue No. 1

The Employer presented the following evidence regarding this issue:

Madge Rachel Centers testified that Thomas Kingery, Vice President of Petitioner, informed employees in attendance at a meeting held sometime in October 1967, that the initiation fee was $10 and later it would be $50 if the employee made less than $3 per hour and $100 if the employee made over $3 an hour. She testified that Kingery said the $10 was to be paid 30 days after the contract "went in". Centers further testified that Kingery made no threats regarding the payment of the initiation fee. Richard Baskerville, John Robbins and Ethel Besecker, other witnesses called by the Employer regarding this issue, testified that Kingery said the employees would have until the time of the election to pay the $10 initiation fee after which they would have to pay the higher initiation fee. Franklin Ball, another witness called by the Employer, testified at one point that Kingery said the initiation fee would be $10 if paid before the election but $50 after the election. However, at another point, he testified that the employees were told the $10 would have to be paid a week or two after the meeting and if not paid by that time, it would be $50.

(3) Thomas Kingery testified that at several meetings which he held for employees of the Employer, he informed them of the Petitioner's policy during an or-

ganizing campaign to accept members as a group for a reduced initiation fee of $10. He testified that he told them the $10 fee could be paid immediately or at anytime up to 30 days after a contract with the Employer was negotiated. Thereafter, the initiation fee would be $50 or $100 depending on their rates of pay. This appears to comport with Petitioner's general policy concerning reduction of initiation fees during organizational campaigns.

Raymond McMacken, a witness called by Petitioner, testified that Kingery stated at organizational meetings that when the Petitioner took in a new group the initiation fee was $10 and they had either 30 days after the election or 30 days after the contract was signed before they would have to pay the higher initiation fee. Thomas Meeds, another witness called by Petitioner, testified that Kingery explained to the employees that the Petitioner reduced its initiation fee during an organizing campaign to $10 and the Petitioner would not expect payment until they started negotiations on a contract. He further testified that either 30 days after the election or by the time negotiations were finished, the higher initiation fee would be required. Elmo Schroyer, a witness for Petitioner, testified that Kingery said the $10 initiation fee would be in effect until 30 days after the election and then the $50 or $100 fee would be the one that employees would have to pay.

The undersigned has carefully considered the testimony of the witnesses regarding this issue and based upon the entire record and the demeanor of the witnesses, I find that Kingery informed the employees that the initiation fee of the Petitioner during an organizing campaign was $10 and that this sum could be paid at any time until a contract was negotiated

and then a higher initiation fee would be charged. This finding is based on the testimony of Kingery, Centers and McMacken who impressed me as reliable and forthright witnesses and appears to me to be the most plausible since this is in accord with the Petitioner's policy in regard to initiation fees during an organizing campaign. I do not credit the testimony of witnesses whose testimony is not in accord with my findings both on the basis of their demeanor and their apparent lack of recollection while testifying.

The Board has long held that a union's offer to waive or reduce initiation fees is a legitimate membership recruiting and campaign tactic. *The Gruen Watch Company*, 108 NLRB 610; *The Root Dry Goods Company d/b/a The Root Store*, 88 NLRB 289. The Employer here appears to contend that the Petitioner's offer of reduced initiation fees was so misrepresented that in effect it became a threat to the employees regarding their employment and in support of this contention relies on the testimony of Frank Ball. However, the testimony of Ball was replete with inconsistencies and contradictions and he did not impress me as a reliable witness. Accordingly, based on the above and his demeanor, I do not credit Ball's testimony.

Further, the evidence shows that the Employer was aware of the fact that the Petitioner was offering reduced initiation fees and by letter dated October 26, 1967 informed the employees ". . . Teamsters Union (was) charging $10 initiation fees . . . or being faced with paying $100 initiation later. . . ." Thus, the Employer knew and informed its employees of the fact that a $10 initiation fee was being solicited and that the initiation fee could possibly be $100 "later" without specifying when later would be. Thus no misrepresen-

tation was made and it appears to me that the employees were in fact told the truth regarding said fees. Accordingly, on the basis of the above, I find that the Petitioner's conduct in regard to this did not impair the employees' freedom of choice in the election. *Dit-Mco, Incorporated*, 163 NLRB No. 147; *Weyerhauser Company*, 146 NLRB 1, *Bronze Alloys Company*, 120 NLRB 682; and *Otis Elevator Company*, 114 NLRB 1490. Moreover, even assuming as asserted by the Employer, the employees were informed by the Petitioner that the reduction in initiation fees would be effective only until the day of the election, I would not find such to be a basis for setting the election aside. *Otis Elevator Company, supra.*

(4) *Issue No. 2*

In support of this issue, the Employer adduced the following evidence:[2]

Dorothy Mumford testified that sometime in October 1967, Timothy Meeds, an employee of the Employer, while they were at work, asked her if she had signed a card and paid her $10 initiation fee. When she informed Meeds that she had done neither, he told her she had better pay the $10 and sign the card or she "could get into trouble." According to Mumford, Meeds also mentioned that the Petitioner could take her into

[2]Richard Baskerville testified that early in September, 1967, Jerry Wright asked him to sign a card for the Petitioner and he initially said he would and then told Wright that he would not. Baskerville testified that Wright did not like it because he would not sign the card but that the conversation was not heated. However, since I find that this incident occurred prior to the filing of the petition, it cannot be considered as a ground for setting aside the election. *Goodyear Tire and Rubber Company*, 138 NLRB 453.

court and she could lose her job if she did not pay a $50 or $100 fee if the Petitioner won the election. She stated that Meeds did not indicate when the $10 fee was due. She testified that Meeds at the conclusion of the conversation said, "I understand you have two children." Mumford testified that at the end of her work day she found her car doors open and the inside soaked by rain but stated that she did not know who was responsible for this act.

In addition, Mumford testified that sometime in late October 1967, Elmo Shroyer, a fellow employee, placed his hand on her arm and asked her if she had paid her money and signed her card. She informed Shroyer that she had not and according to Mumford, Shroyer said, "Well, you had better or you are going to be sorry."

Both Meeds and Shroyer denied ever talking to Mumford about the Petitioner's organizing campaign and denied making the threats which Mumford attributes to them.

Eldon Rike, a witness called by the Employer, testified that Raymond McMacken, a pattern maker, sometime in October 1967, asked him on several occasions if he would rather sign a union card then, than pay $50 or $100 later. Rike testified that McMacken indicated that later referred to either October 19 or sometime after the election. Rike did pay the $10 initiation fee.

McMacken admitted asking Rike to sign a card for the Petitioner and telling him the initiation fee was $10 but denies telling him he would have to pay the $10 by October 19, or pay $50 or $100 later. McMacken also testified that he told several employees that the initia-

tion fee was $10 and they would have at least 30 days after the election to pay it.

Rike also testified that on November 1, 1967, while standing at his machine, he overheard a conversation among employees Charles Petty, William Bumgardner and McMacken. According to Rike, Petty drove a fork lift into the machine shop and Bumgardner asked him if he had signed his card yet. Petty replied "No". McMacken then approached but Rike could hear what he said. McMacken returned to the pattern shop and Bumgardner as he was returning to his machine said, "He would feel funny if he would come out and find his car burned," which apparently referred to Petty. Rike testified the last mentioned statement allegedly made by Bumgardner was not heard by Petty or McMacken. Petty, a witness for the Employer, testified that while making a delivery to the pattern shop, he spoke to McMacken who asked him if he had signed his card. Petty replied that he had not and left. Petty testified that Bumgardner was not present and that Bumgardner had at no time asked him to sign a card for the Petitioner. He further stated that he heard McMacken make no comments other than those related above. Further, Petty did not recall Rike being present.

(5) McMacken testified that he only spoke to Petty on one occasion about signing a card and that occurred in the pattern shop near his work bench while Petty was making a delivery with a fork lift. McMacken states he asked Petty to sign a card for the Petitioner and Petty said he was not interested. He states that Bumgardner was not present during the conversation.

Bumgardner testified that on one occasion while in the machine shop he asked Petty to sign a card. Bumgardner denies saying anything about burning Petty's

car and testified that Petty in fact does not drive to work.

Petty testified that around the last of October 1967, Shroyer asked him if he had signed a card and paid his $10 and he replied in the negative. Shroyer, according to Petty, told him if he had not, "he would bash his head in" and "if he (Shroyer) couldn't do it himself he would have Meeds help him." Meeds was not a party to the conversation and Petty states he was not concerned about it at the time and didn't report it to the Employer unil sometime after the election.

Shroyer testified that sometime in October 1967, he spoke to Petty at the time clock about the advantages of being represented by the Petitioner, and Petty spoke against union representation. Shroyer denies making any threats to Petty.

Gwendolyn Linniman, a witness on behalf of the Employer, testified that sometime around November 1, 1967, Meeds came into the stockroom where she worked, asked her about signing a card and she refused. Linniman testified further that Meeds said, "What would you think if I stick dynamite in your car." She replied, "Be sure and put it under the front seat, that is where I ride." She indicated that both she and Meeds were laughing and joking during the conversation. Linniman stated she made no report regarding the incident to the police or Employer because it did not disturb her.

Meeds states he talked to Linniman about signing a card for the Petitioner. He did not recall telling her that he might put dynamite in her car but if he did, he was only joking.

Linniman testified regarding another conversation

she had with Meeds shortly before the one related above in which he told her the initiation fee was $10 now or $50 later. She stated that Meeds did not indicate when "later" was.

Meeds testified that he told Linniman the initiation fee was $10 until negotiations commenced and after that it would be $50 or $100.

Linda Force, a witness for the Employer, testified that sometime in October 1967 Jerry Wright, a fellow employee, told her that if the employees did not pay the $10 by a certain date they would have to pay $50 or $100 at a later date and if not paid, lose their job if it is a "closed shop". At first she did not recall Wright saying anything to her about the higher initiation fee and only recalled this after her memery was refreshed. On cross examination, she testified that the $50 or $100 would have to be paid only after the Union won the election. She did pay the $10 and also attended a meeting held by Petitioner where the initiation fee was discussed by the Petitioner's representative, Kingery.

(6) Ruby Gilbert testified that sometime in October 1967, Wright collected a $10 initiation fee from her. He told her that if the employees did not pay the $10 and the Petitioner "came in" the fee would be $50 or $100 depending on their rates of pay. She testified Wright made no threats to her regarding her employment and that she in fact paid the $10.

Baskerville testified that he and Wright discussed the effect of the failure to pay the $10 to the Petitioner. He testified that Wright indicated to him if we did not pay the $10 fee it would cost $50 to $100. Baskerville stated he discussed this subject with Wright both before and after he attended the meeting held by Peti-

tioner at which Kingery discussed the payment of reduced initiation fees.

Wright did not testify at the hearing since he was inducted into the Armed Forces sometime after the election and was not therefore available as a witness.

In regard to this issue, the initial question to be faced is whether the remarks allegedly made are attributable to the Petitioner or created an atmosphere whereby a free election was rendered impossible. The record amply demonstrates that McMacken, Bumgardner, Meeds, Shroyer and Wright were employees of the Employer at the time the remarks were allegedly made. The record further indicates that none of the above-mentioned individuals was an officer or representative of Petitioner. The record is clear that the above-named persons were adherents and supporters of Petitioner as evidenced by their soliciting of cards for Petitioner, by their collecting of initiation fees on behalf of Petitioner and by their attendance at meetings held by Petitioner. However, mere advocacy of the Petitioner by these employees does not constitute them agents of that organization. *Poinsett Lumber and Manufacturing Company*, 107 NLRB 234. The Board will not set aside an election won by a labor organization whose adherents allegedly engaged in objectionable conduct absent a showing that the individuals are its agents or that the Union ratified or adopted their conduct unless the conduct creates a general atmosphere among the employees of confusion and fear of reprisal for failing to vote for or to support the union. However the conduct of employees is to be accorded less weight than if committed by agents of the union. *Allied Plywood Corp.*, 122 NLRB 959.

The record clearly indicates that Petitioner did not

authorize or ratify the conduct of which the Employer here complains and in fact was not aware of its alleged occurrence until after the election. Indeed, as found above, the Petitioner did inform the employees at several meetings of its policy in regard to the reduction of initiation fees during an organizing campaign.

On the basis of the record, I find that there is a lack of substantial evidence to show that the participants in the alleged conduct were other than rank and file employees whose actions are not attributable to the Petitioner. *E. I. duPont DeMours & Company, Inc.*, 105 NLRB 710 and *Marman Bag Company, Inc.*, 103 NLRB 456. Moreover, it is my considered opinion that there is insufficient evidence, on the record as a whole, to indicate that an atmosphere of fear was created which rendered a free election impossible. *Orleans Manufacturing Company*, 120 NLRB 630.

Accordingly, on the basis of the above, I find that this alleged conduct is an insufficient basis for setting aside the election.

(7) Furthermore, I make the following findings of fact and conclusions of law regarding the alleged conduct of Wright, Shroyer, Meeds, Bumgardner and McMacken.

With respect to the statements made by Wright to several employees, by Meeds to Linniman, and by McMacken to Rike: I conclude and find that these were simply an offer of a reduction in initiation fees before an election. The Board holds this to be a proper campaign tactic and not objectionable conduct. *Otis Elevator Company, supra.* At least two of the employees involved in these conversations attended meetings held by Petitioner. Kingery truthfully informed them at the meetings of the Petitioner's policy on reduction of ini-

tiation fees during an organizing campaign. The Employer also sent the employees a letter informing them of this matter. Accordingly, I find this conduct to have had no effect on the outcome of the election.

Concerning the conversation that Meeds had with Linniman, I find that Meeds did make a statement to Linniman about placing dynamite in her car. However, as indicated by Linniman, both she and Meeds were laughing and joking during the conversation and she did not take him seriously. This is indicated by the fact that she made no report of the incident. On this basis, I am of the opinion that this is not a sufficient ground for setting aside the election. *Poinsett Lumber and Manufacturing Company, supra.*

I find that Bumgardner contrary to Rike's testimony, did not make the comment about burning Petty's car. This finding is based on Petty's testimony that at no time did Bumgardner and McMacken talk to him together about signing a card. This testimony is corroborated by the two alleged participants. Further, Bumgardner deniese making this statement and Rike is the only person who was in the area to hear it. Rike appeared to me to be an evasive and unreliable witness. His testimony appears implausible as it seems unlikely that a person would make such a statement to no one in particular. Therefore, I find that this incident did not occur.

This leaves only the testimony of Mumford and Petty to be considered. Assuming that Meeds and Shroyer did make the statements as testified to by Mumford and Petty, such statements are clearly isolated in nature especially in a unit of the size involved herein. Thus, in my opinion, these statements could not possibly affect the outcome of the election.

Accordingly, I would conclude and recommend that the evidence adduced by the Employer in support of this issue does not warrant setting the election aside.

Issue No. 3

In support of this issue, the Employer presented the following evidence:

Madge Rachel Centers testified that at a meeting held by Petitioner, an employee asked a question about how the Petitioner could assist the employees in securing improved working conditions. Thomas Kingery responded that first the parties would negotiate and if a strike was necessary, "you know the truckers are Teamsters and when the Teamsters Union are on strike, they cooperate and the truckers will not stop there." Ethyl Besecker, another Employer witness who apparently attended the same meeting, testified that in response to a question by an employee regarding strikes, Kingery stated it is possible truck drivers "would not go to other plants." Besecker indicated, however, that she was not paying much attention to what Kingery said.

(8) John Robbins who attended a different meeting than Centers and Besecker, testified that Kingery said if the employees of the Employer went on strike, "the Teamsters would not deliver or haul from any of the Hartzell factories."

Linda Force testified she was in attendance at the same meeting as Robbins. According to her testimony, there was some discussion at the meeting concerning the possibility of a strike. She stated that Kingery said, "if they would strike our plant they would keep the trucks from the other plants, keep the products from going out."

Kingery testified that at one or two meetings which were held for employees of the Employer during the campaign, questions were asked by employees about a strike. Kingery testified he informed the employees that, "All Teamsters support one another and recognize a picket line." He did not recall any discussions being held about other "Hartzell" plants.

The record indicates that the Employer in addition to the plant involved here has two plants located in Piqua.

Based upon the entire record, the inherent probabilities of the situation and the demeanor of the witnesses, I find that the Petitioner did not make any threat of an illegal secondary boycott. It is my opinion that Centers and Kingery were the more reliable witnesses and their account of the events which transpired at the meetings appeared to me to be more worthy of belief.

Moreover, construing the evidence most favorable to the Employer, I would conclude that the statements made by Kingery indicate his belief that if a strike occurred, truck drivers who were members of the Teamsters Union would of their own volition aid the employess by refusing to make pick-ups or deliveries at any of the Employer's plants. Thus this represents a pledge which falls short of conduct on which to base a finding of objectionable conduct on the part of Petitioner. The comments attributed to Petitioner constitute nothing more than typical permissive campaign propaganda which the Board has found insufficient to warrant directing a new election.

In short, I find this conduct did not impair the employee's freedom of choice and does not constitute a basis for setting aside the election.

CONCLUSIONS AND RECOMMENDATIONS

The undersigned concludes that Employer's Objections 1(A) and 1(D) do not raise material or substantial issues of fact or law with respect to the election and I recommend that said objections be overruled. Since the Tally of Ballots indicates that the Petitioner secured a majority of the valid votes cast in the election, I recommend that Petitioner be certified as the collective bargaining representative of the employees in the appropriate unit.

In accordance with the Order Directing Hearing and with Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 10 days from the date of issuance of this report, any party may file with the Board in Washington, D.C. an original and eight copies of exceptions thereto. Immediately upon filing of such exceptions, the party filing them shall serve a copy thereof on the other parties, and shall file a copy with the Regional Director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. If no exceptions are filed, the Board may decide the matter forthwith upon the record or may make other disposition of the case.

Dated at Cleveland, Ohio this 29th day of March 1968.

National Labor Relations Board

/s/

Richard F. Rice

Hearing Officer

Region 8

(Caption Omitted in Printing)
(Case No. 8-RC-6914)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to an Order to the National Labor Relations Board dated January 31, 1968, a hearing with respect to Employer's Objections 1(A) and 1(D) was held on February 28 and 29, 1968, before Richard F. Rice, Hearing Officer.[1] All parties appeared and participated at the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties.

On March 29, 1968, the Hearing Officer issued and served upon the parties his Report on Objections to Election, in which he found that Employer's Objections 1(A) and 1(D) did not raise material or substantial issues of fact or law with respect to the election, and recommended that such objections be overruled, and the Petitioner be certified as the collective-bargaining representative of the employees in the appropriate unit. Thereafter, the Employer filed timely ex-

[1]The tally of ballots in the election held on November 30, 1967, showed that, of approximately 152 eligible voters, 127 ballots were cast, of which 71 were for, and 54 against, the Petitioner, and 2 were challenged. Thereafter, the Employer filed timely objections to conduct affecting the results of the election. In his Report on Objections and Order Directing Hearing on Objections, dated January 3, 1968, the Acting Regional Director recommended that Employer's Objections 1(B) and 1(C) be overruled, and directed a hearing to resolve the issues raised by Employer's Objections 1(A) and 1(D). These recommendations were adopted in the Board Order of January 31, 1968.

ceptions to the Hearing Officer's Report and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Hearing Officer's Report, the Employer's exceptions and brief, and the entire record in this case, and hereby adopts the Hearing Officer's findings, conclusions, and recommendations.[2]

Accordingly, as we have overruled the Employer's objections, and as the Petitioner has received a majority of the valid ballots cast, we shall certify the Petitioner as the exclusive bargaining representative of the employees in the unit heretofore found appropriate.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters Local 957, has been designated and selected by a majority of the employees of the Employer in the unit heretofore found appropriate, as their representatives for the purposes of collective bargaining, and that pursuant to Section 9(a) of the Act, the said labor organization is the exclusive bargaining agent of all such employees for the

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[2]The Employer's exceptions, in our opinion, raise no substantial issues of fact or law which would warrant reversal of the Hearing Officer's findings, conclusions, and recommendations. We find no support in the record for the Employer's contention the Hearing Officer displayed bias and prejudice. The mere fact that a trier of fact resolves many or even all issues against one side or the other is not indicative of bias or prejudice. *N.L.R.B. v. Pittsburgh Steamship Co.*, 337 U.S. 656.

purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Dated, Washington, D.C. June 12, 1868

Frank W. McCulloch,	Chairman
John H. Fanning,	Member
Sam Zagoria,	Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

(Caption Omitted in Printing)

173 NLRB No. 163 Case 8-CA-5093
D-1519

DECISION AND ORDER

Upon a charge filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters Union Local 957, herein called the Union, the General Counsel for the National Labor Relations Board, by the Regional Director for Region 8, issued a complaint dated August 20, 1968, against Hartzell Propeller Fan Company (Division of Castle Hills Corp.), herein called Resepondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial

Examiner, were duly served upon the Respondent and the Union.

With respect to the unfair labor practices, the complaint alleges that on June 12, 1968, the Board certified the Union as the exclusive collective-bargaining representative of the Respondent's employees in an appropriate unit,[1/] and that on or about July 5 and July 20, 1968, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union, although the Union has requested it to do so. On August 28, 1968, the Respondent filed its answer to the complaint, in which it admitted in part and denied in part the allegations contained therein, and requested that the complaint be dismissed.

On September 6, 1968, the General Counsel filed with the Board a Motion for Summary Judgment, and a memorandum in support thereof, submitting that the Respondent's answer raises no issue of fact or law, and moving that the Board enter judgment against Respondent on the pleadings. Thereafter, on September 9, 1968, the Board, having duly considered the matter, issued an Order Transferring Proceeding to the Board and Notice to Show Cause why the General Counsel's Motion for Summary Judgment shoult not be granted. On September 12, 1968, the Resepondent filed an Opposition to Motion for Summary Judgment, and on October 2, 1968, the Respondent filed an Opposition with Authorities to Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

1/Case 8-RC-6914 (not printed in NLRB volumes).

Ruling on the Motion for Summary Judgment

In its answer to the complaint, and its Opposition to Motion for Summary Judgment, Respondent contends, *inter alia*, that it is entitled to a hearing to insure full litigation of the facts. For the reasons stated below, we find this contention to be without merit.

The record establishes that pursuant to a Stipulation for Certification upon Consent Election approved by the Regional Director for Region 8 on October 26, 1967, an election by secret ballot was conducted on November 30, 1967, under the direction and supervision of the Regional Director, in the unit hereinafter found appropriate.

Upon the conclusion of the balloting, the parties were furnished with a tally of ballots, which showed that, of approximately 152 eligible voters, 127 cast ballots, of which 71 were for, and 54 against, the Petitioner, with 2 challenged ballots, a number insufficient to affect the results of the election. On December 7, 1967, the Employer filed timely objections to conduct affecting the results of the election. Thereafter, a hearing was conducted before a Hearing Officer on the issues raised by the objections, pertaining to (1) whether the Union informed employees that if they did not pay a $10 initiation fee prior to the election, they would be required to pay a $50 or $100 initiation fee, (2) whether employees who were active on behalf of the Union made threats and misrepresentations to employees, and (3) whether the Union threatened employees with an illegal secondary boycott. The Hearing Officer, in his Report on Objections to Election dated March 29, 1968, recommended that the objections be overruled in their entirety, and that the Union, having secured a majority of the valid votes cast in the elec-

tion, be certified as the collective bargaining representative.

The Board, on June 12, 1968, issued its Decision and Certification of Representative, in which it adopted the Hearing Officers findings, conclusions, and recommendations, and certified the Union as the exclusive bargaining representative of the Employer's employees in the unit found appropriate. On June 18, 1968, the Employer filed a motion for reconsideration of the Board's Decision and Certification of Representative, which was denied by the Board on July 11, 1968.

In the instant proceeding, the Respondent, in its Answer, admits the following factual allegations: (1) that it is an employer engaged in commerce within the meaning of the Act; (2) that the Union is a labor organization within the meaning of the Act; (3) that in Case 8-RC-6914, a secret ballot election was conducted in an appropriate unit; (4) that the Union was certified by the Board as the exclusive collective bargaining representative in the appropriate unit; and (5) that the Union, following its certification, requested the commencement of negotiations, and that Respondent thereafter refused to meet and bargain with the Union. The only factual allegation denied by the Respondent is that the Union is the exclusive collective-bargaining representative of a "majority" of the employees in the unit in which the election was conducted. The Respondent's answer did not raise an affirmative defense to the complaint.

It is apparent, in the light of Respondent's answer to the complaint, that it is seeking to relitigate in the instant unfair labor practice proceeding the same issues that were disposed of by the Board in its Decision and Certification of Representative dated June 12,

1968. In this connection, it is well-established that, in the absence of newly discovered or previously unavailable evidence, a respondent is not entitled to relitigate in a Section 8(a)(5) proceeding issues which were or could have been raised in the prior representation proceeding.[2/]

All material issues have been previously decided by the Board, or admitted in the Answer to the Complaint; there are no matters requiring a hearing before a Trial Examiner. Accordingly, the General Counsel's Motion for Summary Judgment is granted. On the basis of the record before it, the Board makes the following:

Findings of Fact

I. The Business of Respondent

The Respondent is, and has been at all times material herein, a corporation duly organized and existing under the laws of the State of Ohio, with its principal office and place of business located in Piqua, Ohio, where it is engaged in the manufacture and sale of fans and blowers. The Respondent, in the course and conduct of its business, annually ships finished products valued in excess of $50,000 directly to points located outside the State of Ohio.

The Respondent admits, and we find that it is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction therein.[3/]

2/ *Pittsburgh Plate Glass Company v. N.L.R.B.*, 313 U.S. 146.

3/ We note that the Board asserted jurisdiction over the Respondent-Employer in the underlying representation proceeding.

II. The Labor Organization Involved

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters Union Local 957, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. **The representation proceeding**

1. The Unit

The following employees of the Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of the Act:

> All production and maintenance employees including foundry employees and trainees in the Employer's plant at 910 South Downing Street, Piqua, Ohio, but excluding all office clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act.

2. The Certification

On November 30, 1967, a majority of the employees of the Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 8, designated the Union as their representative for the purpose of collective bargaining with the Respondent. On June 12, 1968, the Board certified the Union as the collective-bargaining representative of the employees in said unit, and the Union continues to be such representative.

B. The Request to Bargain and the Respondent's Refusal.

On or about July 1 and again on or about July 17, 1968, and continuing to date, the Union has requested, and is requesting, the Respondent to bargain collectively with it with respect to rates of pay, wages, hours, and working conditions of the employees in the appropriate unit. The Respondent admittedly declined, on July 5 and July 20, 1968, and has continued to decline, to bargain with the Union as the exclusive collective-bargaining representative of all employees in said unit.

Accordingly, we find that the Union was duly certified by the Board as the collective-bargaining representative of the employees of the Respondent in the appropriate unit described above in the Board's certification, and that the Union, at all timees since June 12, 1968, has been and now is the exclusive bargaining representative of all the employees in the aforesaid unit, within the meaning of Section 9(a) of the Act. We further find that Respondent has, since July 5 and July 20, 1968, refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The acts of the Respondent set forth in Section III, above, occurring in connection with its operations as described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to

labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial year of certification as beginning on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See: *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F. 2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F. 2d 57 (C.A. 10).

VI. Conclusions of Law

1. Hartzell Propeller Fan Company (Division of Castle Hills Corp.) is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters Union Local 957, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees including foundry employees and trainees in the Employer's plant at 910 South Downing Street, Piqua, Ohio, but excluding all office clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 12, 1968, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 5 and July 20, 1968, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of the Respondent in the aforesaid appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, its employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Reespondent, Hartzell Propeller Fan Company (Division of Castle Hills Corp.), Piqua, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment, with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters Union Local 957, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees including foundry employees and trainees in the Employer's plant at 910 South Downing Street, Piqua, Ohio, but excluding all office clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms

and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Piqua, Ohio, place of business, copies of the attached Notice marked "Appendix."[4/] Copies of said Notice, on forms provided by the Regional Director for Region 8, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 8, in writing, within 10 days from the date of this Decision an Order, what steps the Resepondent has taken to comply herewith.

Dated, Washington, D.C.
Dec. 2, 1968.

Frank W. McCulloch, Chairman

John H. Fanning, Member

Sam Zagoria, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

4/ In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order," the words "a Decree of the United States Court of Appeals Enforcing an Order."

APPENDIX D-1519

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, TEAMSTERS UNION LOCAL 957, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the abovenamed Union, as the exclusive representative of all our employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All production and maintenance employees including foundry employees and trainees in the Em-

ployer's plant at 910 South Downing Street, Piqua, Ohio, but excluding all office clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act.

HARTZELL PROPELLER FAN CO.
(DIVISION OF CASTLE HILLS CORP.)
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1695 Federal Office Building, 1240 East 9th Street, Cleveland, Ohio, 44199 Telephone 216-522-3715.

BEFORE THE NATIONAL LABOR RELATIONS BOARD, EIGHTH REGION

In the Matter of:	)	
	)	
HARTZELL PROPELLER FAN COMPANY	)	CASE NUMBER 8-RC-6914
Division of Castle Hills Corp.	)	
Employer	)	
and	)	
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, TEAMSTERS LOCAL 957	)	
Petitioner	)	

Community Room
The Piqua National Bank and Trust Company
131 West High Street
Piqua, Ohio
Wednesday, February 28, 1968

The above entitled Matter came on for hearing, pursuant to notice, at 10:00 o'clock, a.m.

BEFORE:

RICHARD F. RICE, Hearing Officer.

APPEARANCES:

FRANK J. TUK, Esq.
Cleveland, Ohio, appearing on behalf of the Counsel for General Counsel.

SORRELL LOGOTHETIS, Esq.
Law Firm of Robert C. Knee, 11 West Monument Building, Dayton, Ohio, 45402, appearing on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, the Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1487

HARTZELL PROPELLER FAN COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–2) is reported at 435 F. 2d 562. The Board's decision and order (Pet. App. 21–33) are reported at 173 NLRB No. 163. The related representation decision (Pet. App. 19–21) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1–2) was entered on January 8, 1971. The petition for a writ of certiorari was filed on March 17, 1971.

421-904—71——1

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the union's offer to reduce initiation fees did not preclude employees from exercising a free choice in the Board-conducted election which the union won.

2. Whether substantial evidence supports the Board's finding that certain employees who allegedly engaged in coercive acts were not agents of the union.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pages 4–6 of the petition.

STATEMENT

On November 30, 1967, the Board's Regional Director conducted an election among the Company's production and maintenance employees, which the Union [1] won by a vote of 71 to 54 (Pet. App. 2). The Company filed objections to the election, which were set down for a hearing.

1. The Company contended at the hearing that the Union told "employees that if they failed to join and/or vote for [it] they would have to pay high initiation fees and be compelled to join [the Union]" (A. 342).[2] The testimony credited by the hearing

[1] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters Union Local 957.

[2] "A." references are to the appendix to the briefs filed in the court of appeals.

officer showed that, in the fall of 1967, the Union began a series of organizational meetings for the Company's employees. At these meetings, the Union's vice president informed the employees that its regular membership fee was $50 or $100, depending on an applicant's hourly rate, that the Union's policy was to permit newly organized employees to pay a $10 fee, and that this offer would remain open until 30 days after a bargaining agreement with the Company took effect. The Union's vice president explained further that, although the Union would like to have the employees pay the initiation fee as soon as possible, such payment was "not compulsory at the present" and they "had 30 days after [a contract] in which to have [their] money up" (Pet. App. 5–7; A. 260–264, 267, 269, 270–271). On the basis of the foregoing facts, the hearing officer concluded that the Union had made clear that the reduced fee was in effect well beyond the election, and thus that the reduction offer did not impair the employees' freedom of choice in the election (Pet. App. 6–8).[3]

2. The Company further contended that the Union had engaged in acts of intimidation and coercion in its election campaign (A. 342). Evidence was introduced of three isolated incidents. Employee Dorothy Mumford testified that, approximately one month before the election, a fellow employee, Timothy Meeds, told her that she had better sign a card and pay the $10 fee

[3] The hearing officer further concluded that, even if the Union had restricted the reduced rate to employees who signed and paid prior to the election, that would not be a basis for setting aside the election (Pet. App. 8).

or she "could get in trouble." Meeds also warned Mrs. Mumford that she could lose her job if the Union won the election, adding, "I understand you have two children" (A. 40–41, 53–55). After work that day, Mrs. Mumford found that her car doors were open and the interior soaked by rain, but she had no idea who was responsible for the incident (A. 59). Mrs. Mumford further testified that another fellow employee, Elmo Shroyer, upon learning that she had not signed a union card, said, "well, you had better or you are going to be sorry" (A. 61). Both Meeds and Shroyer denied ever having discussed the organizing campaign with Mrs. Mumford, who never signed a card (A. 316–318, 327–329).

Finally, another employee testified that Shroyer had stated that unless the employee signed a card he "would bash his head in" (A. 206–207), and that, if "I [Shroyer] can't do it by myself, I'll have Mr. Meeds help me do it" (A. 203). Shroyer denied making this threat (A. 330–331, 333–334).

The hearing officer concluded that the Union was not responsible for the above conduct as the record clearly established that the Union neither authorized nor ratified the conduct; furthermore, there was no substantial evidence to show that Meeds and Shroyer were other than rank and file employees whose actions were not attributable to the Union (Pet. App. 13–14). Finally, the hearing officer concluded that, in any event, the incidents were too isolated to create an atmosphere of fear which would make a fair election impossible (Pet. App. 14).

3. Accordingly, the hearing officer recommended that the objections be overruled in their entirety, and that the Union be certified (Pet. App. 18). The Board, finding that the Company's exceptions to the hearing officer's report raised "no substantial issues of fact or law," adopted the hearing officer's findings and recommendation, and certified the Union (Pet. App. 19–21).

Upon the Company's subsequent refusal to bargain with the Union, an unfair labor practice proceeding was initiated by the Board's General Counsel. Finding that the Company had raised no issue which had not been previously considered and rejected in the representation proceeding (Pet. App. 24–25), the Board concluded that the Company had engaged in unfair labor practices and ordered it to cease and desist from the practices by bargaining with the Union upon request (Pet. App. 30–31).

The court of appeals, one judge dissenting, sustained the Board's findings and conclusions and enforced its order (Pet. App. 1–2).

ARGUMENT

1. The Company's assertion (Pet. 9–10) that the decision below conflicts with other decisions of the Sixth Circuit which in turn conflict with a decision of the Eighth Circuit is without merit. While the Sixth Circuit has in other cases taken the position that a union's offer to waive or reduce initiation fees to those joining the union prior to an election interferes with employee free choice sufficiently to invalidate a representation election, see *National Labor*

Relations Board v. *Gafner Automotive & Machine, Inc.*, 400 F. 2d 10 (C.A. 6), and *National Labor Relations Board* v. *Gilmore Industries, Inc.*, 341 F. 2d 240 (C.A. 6), and the Eighth Circuit has taken a somewhat less stringent view of such union offers, see *National Labor Relations Board* v. *DIT-MCO, Inc.*, 428 F. 2d 775, 778–779 (C.A. 8), that conflict is not presented here. In this case, the Union's offer to reduce initiation fees was not limited to those signing up prior to the election, but was represented to be open to all for 30 days after a contract was entered into between the Union and the Company. There thus being no discrimination between those joining the Union before and after the election, the offer was not coercive under the decisions of either the Sixth or Eighth Circuits.

2. Nor is there substance to the Company's further contention (Pet. 13–15) that the Board failed to abide by Section 2(13) of the National Labor Relations Act [4] in concluding that the employees who engaged in the allegedly coercive conduct were not agents of the Union. The detailed report of the hearing officer (Pet. App. 8–16), adopted by the Board, shows that the full range of circumstances surrounding the alleged conduct was considered and that the hearing officer's finding that no agency relationship

[4] Section 2(13), 29 U.S.C. 152(13), provides:

"In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

existed between the accused employees and the Union was not based solely on a finding that the Union had neither authorized nor ratified the challenged conduct. In any event, the record supports the hearing officer's alternate conclusion that the alleged incidents, even if perpetrated with Union approval, were too isolated to affect the fairness of the election.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
CORINNA L. METCALF,
Attorney,
National Labor Relations Board.

APRIL 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971